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NO. 82-2157

In the

Supreme Court of the United States

October Term, 1984

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF DELOITTE HASKINS & SELLS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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PRELIMINARY STATEMENT

Deloitte Haskins & Sells ("Deloitte") submits this brief as *amicus curiae* with the consent of Petitioners and Respondents[1] and urges this Court that the decision of the United States Court of Appeals for the Sixth Circuit in *Central States, Southeast and Southwest Areas Pension Fund* v. *Central Transport, Inc.*, 698 F.2d 802 (6th Cir.

[1] Letters manifesting the consent of the parties have been filed with the Clerk of the Court.

1983), should not be reversed on the mistaken ground that the integrity of multiemployer benefit plan audits is at stake. It is not. The arguments to that effect made by *amicus curiae* Arthur Young & Company ("Arthur Young") and relied upon by Petitioners' and the other *amici* supporting Petitioners are based on an overbroad reading of the Court of Appeals' decision and a misleadingly limited view of the alternative auditing procedures available to verify Respondents' participation data in this case. It is not true, as Arthur Young and the Petitioners contend, that the ruling of the Sixth Circuit "will materially impair the ability of independent certified public accountants . . . to conduct audits of multiemployer benefit plans in accordance with" Generally Accepted Auditing Standards ("GAAS"),[2] as required by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.§1023(a)(3)(A).

No one questions the importance of insuring that the trustees of multiemployer benefit plans such as Petitioners have available to them auditing procedures sufficient for the discharge of their fiduciary duties and, specifically, sufficient so that an independent auditor can form an opinion as to whether the annual financial statements and required schedules are presented fairly in conformity with Generally Accepted Accounting Principles ("GAAP"), 29 U.S.C. §1023(a)(3)(A). Further, Deloitte does not question the general proposition that directly "sampling the entire employee universe" of employers like Respondents, as an auditing procedure to check the reliability of reported participation figures, is consistent with GAAS. The error of the Arthur Young position is its strong and unfounded implication that no other satisfactory auditing procedures exist, also consistent with GAAS, which are practical and not foreclosed by the decision of the Sixth Circuit.

Neither this record nor any authoritative source known to Deloitte suggests that multiemployer benefit plans actually are receiving limited or qualified opinion letters because

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[2] Arthur Young Am. Br. at 2-3.

of their independent auditors' concerns over the reliability of participation statistics. Indeed, Arthur Young did not qualify its opinion in this respect on the 1981 and 1982 financial statements of the plan, even though Petitioners' internal auditors had not directly "tested the universe" of Respondents' employees as Arthur Young delicately argues to this Court "may" be necessary.[3] Obviously, Arthur Young has been able to satisfy itself, by means of other auditing procedures or a reasoned judgment of immateriality, that significant errors do not exist in the documents listing Respondents' participating employees.

INTEREST OF *AMICUS CURIAE*

Deloitte Haskins & Sells is an accounting firm of certified public accountants which has over 100 offices and 8,500 professionals in the United States. Deloitte is, *inter alia*, the independent auditor of Respondents, Central Transport, Inc., other similar companies, public and private, and several thousand employee benefit plans (including multiemployer benefit plans like Petitioners).

Deloitte has followed this case with interest from the District Court for the Eastern District of Michigan to this Court, both as Respondents' independent auditors and as an active member of the American Institute of Certified Public Accountants ("AICPA") and the AICPA Employee Benefit Plans and ERISA Special Committee,[4] whose AUDITS OF EMPLOYEE BENEFIT PLANS (1983) ("1983 INDUSTRY AUDIT GUIDE") was circulating as an exposure draft when this case arose.

Deloitte is concerned that this Court, because of the *amicus curiae* brief of Arthur Young, may erroneously

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[3] *See* Respondents' App. "D" at p. 32a.

[4] James B. Miller, a partner with Deloitte Haskins & Sells, was a member of the Employee Benefit Plans and ERISA Special Committee which prepared the 1983 INDUSTRY AUDIT GUIDE.

conclude that an auditing procedure, which is no more than one means of achieving the ultimate auditing objective, is in fact the only procedure sanctioned by GAAS. Arthur Young has presented this Court with a misleadingly limited view of GAAS and the 1983 INDUSTRY AUDIT GUIDE. Deloitte wishes to present a broader and more balanced view of the relevant auditing considerations, considerations which in fact are not compromised by the Sixth Circuit's ruling.

SUMMARY OF ARGUMENT

Despite the protestations of Petitioners and Arthur Young, the ability of a multiemployer benefit plan's internal and independent auditors to conduct meaningful audits has not been gutted by the United States Court of Appeals for the Sixth Circuit. The decision in this case has no impact whatever on the auditing of known participant records. It in no manner limits audits conducted to identify unreported participants where there is reasonable cause to believe they exist.

The specific auditing procedure addressed by the lower courts is but one method of obtaining evidential matter to support an opinion on participant data. Petitioners seek to verify the material accuracy of reported participant totals by reviewing the records of employees thought by Respondents and the Union not to qualify for participation. The Sixth Circuit ruled that this audit procedure could not randomly[5] be applied to the records of these employers, who had not contractually bound themselves to submit to it.

Other auditing procedures to achieve the same audit objective, *i.e.*, verification of the reliability of participant

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[5] Petitioners define a "random" audit as "one in which an employer is selected without any reason to believe it is not reporting correctly." Petitioners' Brief on the Merits at 12 n.12. Other criteria do apparently enter into the selection decision. One would expect considerations of materiality and typicality, at least, to influence such sampling decisions. *See* NCCMP Am. Br. (July 26, 1983) at 4 n. 1.

data, remain untouched by the decision of the Sixth Circuit. The chief failing of the Arthur Young *amicus* brief is its total silence with respect to those other generally accepted procedures. The specific fact situation presented by this case is one in which perfectly adequate — indeed, more cost effective — audit procedures have been available all along.

For example, Arthur Young did not inform this Court that generally accepted auditing standards permitted it to request that Deloitte perform auditing procedures designed to test the accuracy of Respondents' participation data and issue a "special report" stating the conclusions resulting from such procedures. 1983 INDUSTRY AUDIT GUIDE, §10.6(c); AICPA Professional Standards (CCH) §543 (1972).

Another alternative open to Petitioners and their independent auditor is the testing of Respondents' data by direct comparison to Union dues check-off lists. A high correlation between these independently generated records would significantly reduce the likelihood that material errors exist. AICPA Professional Standards (CCH) §326.18(a) (1980). A low likelihood of material errors makes extensive (and expensive) direct sampling a less preferable audit alternative. There is no auditing jusitification for collecting more than "sufficient" evidence, *id.* §326.19-.21, particularly when the client has a fiduciary obligation to control its administrative expenses.

If further testing is thought desirable after comparison of records from an independent source, another acceptable auditing procedure is direct communication with selected employees. 1983 INDUSTRY AUDIT GUIDE, §10.6(a). "The independent auditor's direct personal knowledge, obtained through physical examination, observation, computation, and inspection, is more persuasive than information obtained indirectly." AICPA Professional Standards (CCH) §326.18(c) (1980). Moreover, because the pertinent factual inquiry would be whether nonunion employees were per-

forming bargaining unit work, direct contact with employees should be more illuminating than mere perusal of employer financial and personnel records in fact settings like the case at bar.

In short, there is no justification whatever for Arthur Young's unqualified assertion that the decision of the Sixth Circuit "will materially impair the ability of independent certified public accountants . . . to conduct audits of multiemployer benefit plans in accordance with GAAS." Arthur Young Am Br. at 2-3.

ARGUMENT

I.

THE LIMITED SCOPE OF THE SIXTH CIRCUIT'S DECISION FROM AN AUDITOR'S VIEWPOINT

Quite apart from their contractual argument, Petitioners ask this Court to "give specific content to the 'prudent man' rule of ERISA," Petitioners' Brief on the Merits at 5, by which they essentially mean that this Court should give them the same broad power to audit employer records that the Internal Revenue Service has with respect to taxpayer records. Petitioners attempt to marshal various arguments in support of the sweeping authority they seek, including the claim that the Sixth Circuit's ruling deprives them of an auditing procedure to which they must have absolutely unfettered access if they are independently to verify the completeness of employer representations and, in the process, satisfy their outside auditors that their internal auditing procedures comply with GAAS. *Id.* at 41. However, the facts in this case (*i.e.*, large employers with their own reliable internal accounting controls and outside auditors; an active and independent union; and no evidence of material error) simply do not support this claimed necessity for the specific audit power sought by Petitioners. It is easier to understand why the integrity of the auditing process is not

threatened by the Sixth Circuit's decision if a few general points are kept firmly in mind.

A. Only material errors bear on auditing conclusions.

"Materiality" is a crucial concept for accountants, but not subject to authoritative definition because its meaning is always context-specific. The possibility of a million dollar error is material to a small private company but generally would be immaterial to an entity with assets exceeding 4 billion dollars. In terms of people rather than dollars, it is not material to an auditor that a multiemployer benefit plan apparently covering 500,000 individuals may actually cover 499,996, or that an employer contributing for hundreds of eligible employees may have erred as to four.

Deloitte does not know how Petitioners' auditors satisfied themselves with respect to the reliability of Respondents' records in 1981 and 1982. However, one very real possibility is that they made a judgment that any error in reported participation data would surely be an immaterially small percentage of Respondents' known participants.

The element of materiality underlies the application of all generally accepted auditing standards, particularly the standards of field work and reporting. AICPA Professional Standards (CCH) §150.03 (1972). Although a difficult concept to define, the impact of materiality on the auditor's reasoning processes is readily describable:

> The concept of materiality is inherent in the work of the independent auditor. There should be stronger grounds to sustain the independent auditor's opinion with respect to those items which are relatively more important and with respect to those in which the possibilities of material error are greater than with respect to those of lesser importance or those in which the possibility of material error is remote. *Id.* §150.04.

Evaluating materiality is more than a mechanical comparison of the dollar value of a particular item under examination to a certain component of the financial statements (*i.e.*, total assets, equity, revenues, net income, etc.):

> [T]he concept involves qualitative as well as quantitative judgments. The significance of an item to a particular entity . . ., the pervasiveness of the misstatement . . ., and the impact of the misstatement on the financial statements taken as a whole are all factors to be considered in making a judgment regarding materiality. *Id.* §509.16 (1974).

Although the court of appeals did not overtly apply a materiality analysis to the auditing question before it, many parallels exist with the "reasonable cause" analysis the court did use. In this case, either route led to the conclusion that "concern over the status of four employees [does not] justify an investigation into the records of all Transport's employees." 698 F.2d at 813. The court had found that ERISA did not afford Petitioners a statutory right to audit nonparticipant records and was considering whether Article IV of the governing trust agreements gave them the right. The court found a "limited right" to audit nonparticipant records in this case, responsive to Petitioners' actual needs and mindful of the apparent immateriality of the potential error in Respondents' records. There is no reason why this decision should prevent courts faced with material and pervasive errors in employer records from finding that trust provisions like Article IV justify broader audit powers than were needed here (*see* discussion at 10-11, *infra*).

B. No issue is raised with respect to the records of employees reported as plan participants.

The vast majority of eligible participants are identified individuals. Underfunding has a great deal more to do with the failure of employers to contribute enough or at all for

identified participants than it does with the failure to contribute for unidentified but eligible employees. It is therefore worth emphasizing that the court of appeals in no way restricted the auditing of identified participant records. As the court said, the Petitioners:

> may also examine records relating to admittedly covered employees which are necessary to determine when their coverage began and ended or the proper amount of contributions. They may also be entitled to other records such as drivers' logs which relate only to covered employees. It would appear that all truck drivers employed by Transport are covered by the collective bargaining agreements. 698 F.2d at 812.

Petitioners claim that their auditors had identified underreporting errors for Respondents' covered employees aggregating $268,362.50 (Petitioners' Brief on the Merits at 8). However, aside from the immateriality of this amount in light of the many millions of dollars contributed by Respondents to Petitioners annually, all the allegedly erroneous practices which led to the errors claimed were brought to light by reviewing the records of covered employees (*see id.* at 8 n.8). The only evidence in this record bearing on the need to review other employee information is the fact that Respondents had made contributions on behalf of four possibly ineligible individuals among the hundreds of properly participating employees. These are the facts an auditor must have in mind when determining what further audit procedures, if any, are called for in the circumstances presented.

C. The Sixth Circuit held only that one particular auditing procedure could not be used by plan trustees with respect to employers who had not contractually bound themselves to submit to it, in the absence of reasonable cause to believe the employer's records were materially in error.

Petitioners and their *amici* write as though the Sixth Circuit had announced as a universally applicable matter of law that multiemployer plan trustees must accept

unquestioningly whatever participant identification data employers submit (subject only to a uselessly limited audit power). No doubt Petitioners portray the opinion of the court of appeals broadly to make it a bigger and more vulnerable target in this Court. It is instructive, however, to consider how Petitioners and their *amici* could be expected to characterize the opinion in future litigation brought to resolve factually distinguishable auditing disputes between plans and employers. In this context, plan trustees no doubt will stress that the court of appeals tailored its decision in light of the particular parties and contracts before it to insure that Central States would have such access to Central Transport's records as it had demonstrated a need for. Different facts may make different auditing procedures reasonably necessary, and call for a different judicial response in cases where trustees must resort to the courts.

A good example of a substantially different fact situation is *Hughes* v. *Baker Cement Contractors, Inc.*, No. 81-3307 (6th Cir. July 6, 1982) (unreported), a case set forth in the appendix to the *amicus curiae* brief of the Bricklayers Fringe Benefit Funds, et al. That case, like this one, reached the Sixth Circuit after a summary judgment for a defendant employer. The district court held that the employer did not have to disclose records pertaining to employees it had classified as nonparticipating, because the plaintiff trustees could complete their audit by resorting to union records. However, in *Hughes* the facts were very different. The collective bargaining agreement did not require laborers employed by Baker before June 1, 1975 to join the union. Moreover, Baker had no collective bargaining agreement in three geographic areas covered by the plans and therefore could use non-union labor in those areas. Accordingly, as the court of appeals noted,

> there were at least two groups of employees of indefinite size for whom the employer was required to make trust fund contributions but whose eligibility for same could not be determined from Union records. (Bricklayers App. 5a).

In the case at bar, all employees who perform bargaining unit work are required to be union members. A two-month long audit had revealed only that four employees for whom Respondents made contributions were not union members. The court of appeals' opinion discussed possible erroneous employer reporting in terms of particular, identifiable employees because the facts before the court suggested no more. A very different situation exists where possible errors affecting entire "groups of employees of indefinite size" cannot be cross-checked against union records. In *Hughes* the court of appeals reversed because the district court plainly erred in deeming the union records to be a dependable, independent source of verification in the auditing sense. The union records, although independent, were not reliably complete.

The *Hughes* panel noted that *Central States, Southeast and Southwest Areas Pension Fund* v. *CRST, Inc.*, 641 F.2d 616 (8th Cir. 1981) "appears to be distinguishable from the case at bar on its facts" (Bricklayers App. 6a). That is true, because the facts in *CRST*, just as in the case before this Court, strongly indicate that the union records *were* reliable. *Id.* at 619.[6] There is no warrant in the court of appeals' ruling now before this Court for the conclusion that it would deny access to necessary auditing records in a *Hughes*-type setting merely because plan trustees couldn't identify the possibly omitted employees by name.

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[6] The *Hughes* panel rejected the suggestion "that the union steward is the ultimate safeguard as to who is doing laborers' work" (Bricklayers App. 5a). An auditor makes no such extreme assumption in deciding whether particular union records will be useful. *See* discussion *infra* at 16-17.

II.
THE INDEPENDENT AUDITOR OF A PLAN MUST BE ABLE TO OBTAIN "SUFFICIENT COMPETENT EVIDENTIAL MATTER . . . THROUGH INSPECTION, INQUIRIES, AND CONFIRMATIONS TO AFFORD A REASONABLE BASIS FOR AN OPINION REGARDING THE FINANCIAL STATEMENTS UNDER EXAMINATION."

The quotation in the above heading is known to auditors as the third standard of field work, one of the generally accepted auditing standards. *See* AICPA Professional Standards (CCH) §§150.02 (1972) and 326.01 (1980). "Most of the independent auditor's work in forming his opinion on financial statements, consists of obtaining and evaluating evidential matter concerning the assertions in such financial statements." *Id.* §326.02. The financial statements of multiemployer plans are premised in part upon assertions regarding the number of participants, a number calculated in the first instance by totalling the numbers reported by employers. The auditor[7] wants to accumulate sufficient "audit evidence" (defined more broadly than legal evidence) to support the numbers reported, but is not interested in gathering additional evidence after he is persuaded that any possible errors would be immaterial to the overall fair presentation of the plan's financial statements (or an employer's records). The third standard of field work describes both parameters: Evidence must be "sufficient", but it becomes sufficient as soon as it provides a "reasonable basis for an opinion."

> The independent auditor's objective is to obtain sufficient competent evidential matter to provide him with a reasonable basis for forming an opinion. The amount

[7] This discussion holds true for either internal or independent auditors. One difference between the two is that the independent auditor, before deciding what tests he should make, first considers to what extent he can rely on the internal auditing work. *See* AICPA Professional Standards (CCH) §326.11 (1980).

> and kinds of evidential matter required to support an informed opinion are matters for the auditor to determine in the exercise of his professional judgment after a careful study of the circumstances in the particular case. In the great majority of cases, the auditor finds it necessary to rely on evidence that is persuasive rather than convincing. *Id.* §326.19.

In evaluating a plan's participation data, the data supplied by employers is evidential matter. Union records are also evidential matter, but provide "greater assurance of reliability" than employer data because they are from an independent source. *Id.* 326.18(a).

The specific auditing question raised by the case at bar is whether sufficient evidential matter was available to Petitioners' internal auditors to give them a reasonable basis for forming an opinion concerning the reliability of Respondents' participation data. That question is addressed in subsequent sections of this brief and answered affirmatively. The broader question Arthur Young seeks to raise in this Court is whether an independent auditor can form a similar opinion of reliability concerning a plan's overall participation data if, as to certain contributing employers, certain evidential matter cannot be obtained. The answer to this question is also yes, so long as sufficient evidential matter can be obtained by other means.

Because Petitioners actually audit only selected employers to verify reported participation data, they claim they must have unfettered discretion to obtain evidential matter by sampling the entire universe of an employer's participating and nonparticipating employees. However, the need for or desirability of a selective audit of employers does not lead to the conclusion that a particular audit procedure must invariably be applied to every employer selected. Once the plan's auditors select a particular employer for auditing, their concern should be with forming an opinion about that employer's data by whatever means are available and most practical. The procedures are the

same for individual employer audits as they are for the independent auditor's examination of overall plan data; only the scale is different. In each case the auditor must obtain sufficient evidence to support a reasoned judgment that there is no material error.

III.
IN FACT SITUATIONS LIKE THE CASE AT BAR, PLAN AUDITORS CAN SATISFY THEMSELVES AS TO THE ACCURACY OF REPORTED PARTICIPATION FIGURES BY OBTAINING A SPECIAL REPORT FROM THE EMPLOYER'S INDEPENDENT AUDITOR.

This Court has been asked to consider the impact of the Sixth Circuit's decision on very different auditing situations involving small, marginal and "transient" employers in other industries. As noted earlier, this *amicus* does not read the opinion of the court of appeals as an attempt to broadly prescribe the limits of auditing authority available to multiemployer plans, regardless of the situation (see 10-11, *supra*). Rather, the court was reacting to a demand that it aid in the imposition on Respondents of a particular auditing procedure, the need for which *in this case* was not demonstrated. Respondents are not small, marginal or "transient" employers. They are large companies with substantial assets. They have separate benefit plans for employees not covered by collective bargaining agreements. Moreover, they have an independent auditor whose opinion Petitioners can solicit.

A. Section10.6(c) of the 1983 INDUSTRY AUDIT GUIDE.

The auditing problem presented by this case — and its solution — was foreseen and provided for in the 1983 INDUSTRY AUDIT GUIDE:

> 10.6 If the auditor is unable to examine the participant's records, *which may occur in a multiemployer plan*, there

> may be circumstances, depending on the existing control environment, in which the auditor can obtain the necessary assurance by applying one or more procedures, such as —
>
> . . .
>
> C. Obtaining a special report from the auditor of the employer company stating that appropriate auditing procedures (as described above) have been performed, and obtaining the auditor's conclusions regarding the procedures applied. In addition, the plan auditor should apply such other auditing procedures as he considers necessary in the circumstances. In this regard, it may be necessary for the plan auditor to request the other auditor to apply additional tests. (See SAS No. 1, Sec. 543) (emphasis added).

Neither Arthur Young nor the Petitioners' internal auditors have ever requested a special report from Respondents' independent auditor, or asked it to apply particular tests to Respondents' records. Presumably they felt it was unnecessary in the circumstances presented. However, the alternative was there to be used. Issuance of the 1983 INDUSTRY AUDIT GUIDE did not alter previously-existing procedures available to achieve the auditing objective of verifying the reliability of participant data.

Section 10.6(c) is no more than an application to multiemployer plans of more general principles concerning the use by one auditor of another independent auditor's work. Those principles, discussed next, were issued in 1972 and modified in 1981.

B. AICPA Professional Standards §543.

Section 543 provides guidance to "principal" auditors considering whether to use the work of "other independent auditors who have examined the financial statements of one or more subsidiaries, divisions, branches, components, or investments . . . ." AICPA Professional Standards (CCH) §543.01 (1972, as modified in 1981). The relationship between multiemployer plans and their contributing employers

is analogous to the relationships enumerated in §543, as §10.6(c) of the 1983 INDUSTRY AUDIT GUIDE makes explicit.

Section 543.10 describes the nature of the inquiry the principal auditor should make "concerning the professional reputation and independence of the other auditor." Inquiries concerning reputation and standing are unnecessary where these matters are already known to the principal auditor. The professional reputation and standing of the "Big Eight" accounting firms is well known to Arthur Young, itself one of that group.

Once a principal auditor decides to make use of another independent auditor's work, the principal auditor must decide whether to make reference in its opinion to the examination of the other auditor. Even where such reference is made, it is "not to be construed as a qualification of the opinion . . ." AICPA Professional Standards (CCH) §543.08. However, reference ordinarily is unnecessary if the other auditor's competence is known or the matter audited by the other is not material to the principal auditor's opinion. *Id.* §543.05 *Cf.* 1983 INDUSTRY AUDIT GUIDE, §12.21.

IV.
OTHER ALTERNATIVES AVAILABLE TO PLAN AUDITORS TO VERIFY THE ACCURACY OF REPORTED PARTICIPATION FIGURES: 1983 INDUSTRY AUDIT GUIDE, §10.6(a).

A. Union records.

Other briefs before this Court make the point that the Union and Petitioners are distinct entities whose interests may not always be precisely congruent, citing *inter alia* this Court's recent decision in *Schneider Moving & Storage Co.* v. *Robbins*, ___ U.S. ___, 104 S. Ct. 1844, 80 L.Ed.2d 366 (1984) (plan trustees have direct access to the courts without resort to an arbitration remedy they cannot compel the union to institute on their behalf). From the auditor's

viewpoint, the question is not whether unions and benefit plans have identical interests, but whether union records (dues check-off lists) are reliable, independent records which will be useful in verifying the accuracy of employer-generated lists of covered employees. In assessing the reliability of union records, the auditor will consider the union's natural motives to enroll and collect dues from every new employee who performs bargaining unit work. The auditor also will consider the nature of the industry involved and the provisions of the governing collective bargaining agreements to determine whether substantially all eligible employees will be union members. Although these considerations do not lead to the conclusion that unions records are infallible, in cases like the one now before this Court they do support an inference of reliability. Comparison with union records is one of the tests specifically suggested in the 1983 INDUSTRY AUDIT GUIDE, §10.6(a).

Accordingly, if an employer's records are substantially congruent with the union's, the plan's auditor has reason to believe that any errors of omission probably will be immaterial. In cases where there is reason to believe that union records may be significantly incomplete, the plan's auditor may wish to observe, question or correspond with a sampling of employees directly.

B. Direct communication with participants.

The eligibility of Respondents' employees to participate in the Central States plans is a function of the work they do, not their rate of pay or other financial data concerning them in Respondents' records. The "phantom" participants Petitioners seek to discover would, if they existed, be nonunion employees engaged in bargaining unit work. Although the audit procedure of sampling random employee records chosen from the total employee population might locate unidentified but eligible individuals, sampling the employees themselves by directly communicating with them is a more focused audit procedure suggested by the 1983 INDUSTRY AUDIT GUIDE, §10.6(a). Neither procedure,

in the case at bar, has much to recommend it in comparison to the alternatives discussed earlier, *i.e.*, a special report from an employer's auditor and verification through union records. However, there may be other fact situations in which some form of direct communication would prove useful.

It is possible to hypothesize a fact setting in which entire categories of eligible employees are not required to be union members, the employer has no independent auditor and the employee population is so widely scattered, transient and otherwise difficult to identify that a reasonably prudent plan auditor might conclude that the only feasible procedure in the circumstances presented would be to test employee records drawn from the entire universe of that employer's employees. If the plan's governing trust agreement contained a clause like Article IV in the case at bar, a district court might well agree with the plan trustees that they had the right to conduct that reasonably necessary auditing procedure. This result would do no violence at all to any principle set forth in the court of appeals' opinion in the case at bar.

From an auditor's viewpoint, the mere possibility that such a fact setting might arise does not compel the conclusion that any one audit procedure must be available for use in every case, including the majority of cases in which other procedures to accomplish the audit objective are available, practical and cost effective.

CONCLUSION

For all the foregoing reasons, Deloitte Haskins & Sells respectfully submits that this Court should not disturb the decision of the Sixth Circuit out of concern for its effect on audits of and by multiemployer plans.

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